No. 45088-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY CHARLES SITTON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

I. ISSUES

A. Did the deputy prosecutor commit misconduct by misstating the law?

B. Was there insufficient evidence to convict Possession of a Controlled Substance if the possession was merely residue and not a measurable quantity of the controlled substance?

C. Did the trial court improperly impose the cost of indigent attorney fees and a contribution to the Lewis County Drug Fund?

II. STATEMENT OF THE CASE

Sitton has lived in a detached garage located at 823 Wayne Drive in Centralia, Washington, for the last 10 years. RP 117, 128. On August 11, 2012, according to Sitton, he and his friend, Doug, lived in the garage. RP 117. Doug was staying in the garage on the couch, not in Sitton's bedroom. RP 117. The garage is huge. RP 118. The garage has a bedroom and other rooms partitioned off inside of it. RP 118. Sitton's bedroom is a loft in the garage that used to be a beauty salon. RP 118. Sitton is a heroin addict. RP 35, 118.

On August 11, 2012, at approximately 8:00 a.m., Centralia Police Officer Haggerty went to the garage residence located at 823 Wayne Drive in Centralia. RP 24-26. Officer Haggerty was accompanied by Officer Angie Humphrey and Sergeant Buster. RP

26. Officer Haggerty went to the garage looking for someone who had a warrant and in regards to a theft of an X-box gaming console. RP 26. Sitton was not a suspect in the X-box theft. RP 27.

Officer Haggerty had previous contacts with Sitton at the 823 Wayne Drive detached garage and knew the garage had security cameras. RP 29. When the officers approached the garage they heard a male voice inside ask, "Why are the cops here?" RP 30.

Sitton contacted Officer Haggerty out at the slider door, which is the primary entry/exit of the garage. RP 30. Officer Haggerty spoke with Sitton about whether a Ms. Sanchez Anderson was at the residence, Sitton said she was not, and Officer Haggerty believed Sitton was being truthful. RP 33. Officer Haggerty told Sitton the police were also investigating the theft of the X-box and that the proceeds from the theft had gone to Sitton's house. RP 33. Officer Haggerty read Sitton his *Miranda*[1] warnings because the allegation was heroin was being sold out of the garage. RP 34.

Officer Haggerty told Sitton someone said he was a drug dealer, which Sitton denied. RP 35. Officer Haggerty asked Sitton "about paraphernalia, scales, baggies, any that would go with narcotics use and/or possession." RP 35. Sitton said there were

[1] *Miranda v. Arizona*, 384 US 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

some things like that in his residence and admitted to Officer Haggerty that he was a heroin addict. RP 35.

Officer Haggerty asked Sitton for his cooperation and honesty. RP 37. Officer Haggerty told Sitton he would like to have anything (drug related) that was in the garage. RP 37. Officer Haggerty did not go inside the garage. RP 37. Sitton went into the garage and brought out a small wooden box that contained several items of what appeared to be random drug paraphernalia. RP 37. The wooden box was full of artifacts that were indicative of heroin and methamphetamine use. RP 38. There was a pipe used for smoking methamphetamine. RP 38. There was also a small metal cup that contained heroin. RP 48, 77.

Sitton was charged by information with Count I – Possession of Heroin, and Count II – Possession of Methamphetamine. CP 1-3. Sitton elected to have his case tried to a jury. *See* RP. Sitton testified in his own defense. RP 117-41. Sitton denied that the items were his, as he did not use methamphetamine and he did not inject heroin, he smoked it. RP 119-20. Sitton testified that he had been led to believe that Officer Haggerty was just going to destroy all of the paraphernalia because Sitton had been cooperative. RP

123-27. Sitton was convicted as charged. CP 25-26. Sitton timely appeals his sentence. CP 40-51.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY MISSTATING THE LAW DURING CLOSING ARGUMENT.

Sitton argues that the deputy prosecutor committed prosecutorial misconduct[2] by misstating the law in regards to constructive possession. Brief of Appellant 6-10. The deputy prosecutor did not misstate the law and therefore did not commit misconduct. If this Court were to find the deputy prosecutor's argument was a misstatement of the law it was harmless and Sitton cannot meet his burden to show he was prejudiced.

1. Standard Of Review.

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v.* Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

[2] "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct. *State v. Fisher*, 165 Wn.2d 727, 740, fn1, 202 P.3d 937 (2009).

2. The Deputy Prosecutor Did Not Commit Misconduct By Misstating The Law During His Closing Argument.

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Thorgerson,* 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial misconduct, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in

the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

a. There was no misstatement of the law by the deputy prosecutor.

Sitton complains that the deputy prosecutor misstated the law when he said this statement in his rebuttal closing argument:

> You can't own drugs, because they are illegal. As long as you know they are there and you can exercise dominion and control, guess what? You're guilty. Even if you didn't intend to use those drugs, hadn't used those drugs, if you know they are there and you know what they are, you are guilty as long as you can exercise dominion and control.

RP 181. There was no objection to this argument. RP 181. Sitton takes issue with the statement that you cannot own drugs because they are illegal and the inartful wording of the deputy prosecutor's argument, that if you **can** exercise dominion and control. Brief of Appellant 8-10. The crux of the argument is that the State could only prove possession in this case by constructive possession and a misstatement regarding dominion and control was prejudicial because the deputy prosecutor was telling the jury to convict if Sitton **could** have exercised dominion and control, not if he did exercise dominion and control. Brief of Appellant 8-10. The deputy prosecutor's argument, while perhaps inartful, taken in context of his entire closing argument, was not a misstatement of the law, and therefore, there was no prosecutorial misconduct.

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v.*

Yates, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

Possession of a controlled substance may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person is in actual possession when a controlled substance is in the personal custody of the person. *Callahan*, 77 Wn.2d at 29. When a person does not have actual possession but has dominion or control over the controlled substance or the premises, the person is in constructive possession of the controlled substance. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (citation omitted). A person is not required to have exclusive control for the State to establish constructive possession. *Cote*, 123 Wn. App. at 549. A person who is in mere proximity of a controlled substance, without more, is not in constructive possession of the controlled substance. *Id.*

Determinations regarding dominion and control are made looking at the totality of the circumstances. *State v. Davis*, 176 Wn. App. 849, 862, 315 P.3d 1105 (2013) (citations omitted).

"Dominion and control over premises raises a rebuttable presumption of dominion and control over objects in the premises." *Davis*, 176 Wn. App. at 863 (citations omitted). Additionally, the ability to take actual possession of the controlled substance and exclude others from possession can be considered when determining whether a person had dominion and control over a controlled substance. *Id.*; WPIC 50.03.

During his first closing argument, the deputy prosecutor explained possession and acknowledged they did not have actual possession in this case. RP 168. The deputy prosecutor then focused on constructive possession. RP 168. The deputy prosecutor stated:

> Constructive possession occurs when there's no actual possession, but there's dominion and control over the substance. It means that the item is not in the person's hands but they have dominion and control over it.
>
> Dominion and control: What does that mean? First off, keep in mind that dominion and control need not be exclusive to support a finding that a person was in constructive possession of an item or in the case controlled substances. That means that more than just one person can be in constructive possession of the same item at the same time. You have contents in your refrigerator in your house. You live there with your significant other. Because you both know there are certain items in the fridge, say a couple of cans of beer, you can be said to be both in constructive possession of those items at the same time. You can

> both go to the fridge. You can both upon up the refrigerator door. You can both take actual possession of these beers inside.
>
> It doesn't have to be one person, one substance one time. That's not the law.
>
> Now factors in deciding whether a person has dominion and control over an item are things such as whether the defendant had the immediate ability to take actual possession of the substance. Well, Mr. Sitton did just that, when he went inside his residence, after he spoke with Officer Haggerty and gathered these things up.
>
> Now transitory possession is not a crime. The fact that he picked these up is not a crime. That's not the possession we are talking about.

RP 169-70. There is no complaint from Sitton that anything stated by the deputy prosecutor regarding constructive possession or dominion and control during the initial closing argument was a misstatement of the law. The inartful use of the word can during the rebuttal closing was not a misstatement of the law, particularly when one takes into account the closing argument as a whole. The deputy prosecutor, in great detail went through the requirements of constructive possession and dominion and control. RP 169-70. His follow up statements regarding dominion and control after stating, "[n]ow possession does not mean ownership and does not mean use. You cannot own something that is illegal to possess so the fact that they say, not my drugs, doesn't matter" is not a misstatement

of the law. RP 181. The deputy prosecutor's argument, in context, is an argument that a person does not need to own an object, that if they can take actual possession of the controlled substance, they control the premises, they are in constructive possession because Sitton and Ms. Anderson would have dominion and control. This is an accurate statement of the law and not improper conduct. Therefore, the argument was not prosecutorial misconduct and Sitton's convictions should be affirmed.

b. If the deputy prosecutor did misstate the law the error was harmless.

The State does not concede that any of the statements the Deputy Prosecutor made were improper. Arguendo, if this court finds the statements improper, and therefore misconduct, any such misconduct was harmless error. Sitton has the burden of showing the misconduct was prejudicial considering the context of the entire record. *Gregory*, 158 Wn.2d at 809. The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *State v. Monday*, 171 Wn.2d at 675.

The garage was Sitton's residence. RP 117. The officers knew it was Sitton's home because they had contacted him at the garage several times in the past. RP 29, 122. Sitton had the ability to exclude people from the garage, as it was his residence, and he

even testified that he told Christine, who was hiding because she had warrants to get out, and she did leave. RP 124. Sitton was able to take actual possession of the drugs. RP 35, 37-38, 127. After speaking with Officer Haggerty, Sitton agreed to go inside the garage and gather up the drug paraphernalia, which included the methamphetamine pipe and little metal cup with the heroin residue. RP 37-38, 120-21, 123-27. Sitton's ability to walk through his home and pick up and collect the drug paraphernalia that contained heroin and methamphetamine residue sufficiently proves that Sitton had the ability to take actual possession of these drugs. Looking at these facts, under a totality of the circumstances analysis, Sitton was in constructive possession of methamphetamine and heroin. *Davis*, 176 Wn. App. at 863.

Sitton cannot make the requisite showing that the Deputy Prosecutor's misconduct was prejudicial to him in the context of the entire record. *Gregory*, 158 Wn.2d at 809. Sitton did not object to the deputy prosecutor's argument. The inartful use of the word "can" was not so flagrant and ill intentioned that the resulting prejudice could not have been neutralized by an admonition to the jury. *See Thorgerson*, 152 Wn.2d at 443. This Court should affirm Sitton's convictions.

B. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN SITTON'S CONVICTIONS FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE.

The State presented sufficient evidence to sustain the jury's conviction for Possession of Heroin and Possession of Methamphetamine. The evidence introduced proved Sitton possessed heroin residue in the tin cup and methamphetamine residue in the glass pipe.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Prove Sitton Committed The Crime Of Unlawful Possession of a Controlled Substance.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits

the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Sitton argues there was insufficient evidence to support his convictions because the heroin and methamphetamine were not a measurable quantity. Brief of Appellant 10-16. Sitton urges this Court to overturn binding precedent reasoning the common-law

element of requiring proof of a measurable amount should be recognized. Brief of Appellant 14. Sitton does not cite to any Washington case law, statutory language, or legislative history that would support a common-law element of a measurable amount.

To convict a person of possession of a controlled substance the State must prove that the person possessed a controlled substance, and specify what the substance is. RCW 69.50.4013; WPIC 50.01; WPIC 50.02. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). A defendant may raise an unwitting possession defense, which requires the defendant to show, by a preponderance of the evidence that they did not knowingly possess the controlled substance. *Bradshaw*, 152 Wn.2d at 538; WPIC 52.01. The ability to raise an unwitting possession defense lessens the harshness of the strict liability crime. *Bradshaw*, 152 Wn.2d at 538. The defense also alleviates any concern that a person could be convicted for quantities of a controlled substance that were so small that the person could not have been aware they possessed a controlled substance. For example a person who unwittingly possessed a controlled

substance because there was residue found on currency they possessed is protected by the unwitting possession defense.

The State is not required to prove a defendant possessed a minimum amount of a controlled substance to sustain a conviction for unlawful possession of a controlled substance. *State v. Larkins*, 79 Wn.2d 392, 394-95, 486 P.2d 95 (1971); *State v. Higgs*, 177 Wn. App. 414, 435-38, 311 P.3d 1266 (2013) *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008); *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994); *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991), *review denied* 118 Wn.2d 1019 (1992). Larkins was convicted of unlawful possession of a narcotic drug, Demerol, under former RCW 69.33.230, which prohibited possession of any narcotic drug except authorized by law. There was no knowledge or minimum amount required by the statute, as there is no minimum amount required in RCW 69.50.4013. Larkins argued due to the nature of the definition of narcotic, the State must be required to show Larkins unlawfully possessed a usable amount of the drug. The court rejected Larkins's argument, stating:

> The standard suggested by the defendant does violence to the clear language of RCW 69.33.230. Although the legislature had the power to do so, it provided no minimum amount of a narcotic drug, possession of which would sustain a conviction. It adopted no "usable amount" test. On the contrary,

> the legislature provided that possession of *any* narcotic drug is unlawful unless otherwise authorized by statute…For us to establish the minimum standard suggested would require us to substitute our wisdom for that of the legislature. This we will not do.

Larkins, 79 Wn.2d at 394 (emphasis original). The reasoning in *Larkins* applies to cases prosecuted under RCW 69.50.4013 because the current statute is also silent regarding any minimum quantity. As recently as October 2013 Division Two has rejected the imposition of a common law element a measurable quantity of a controlled substance. *Higgs*, 177 Wn. App at 437.[3]

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 652-53, 466 P.3d 508 (1970). Once the Washington State Supreme Court "has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by" the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (citations omitted). Sitton is asking this court to ignore precedent set by the Supreme Court and make a new requirement that is not found in the plain language of the statute, that some minimum quantity of a controlled substance is a necessary and essential element of the crime of

[3] It is curious Sitton does not acknowledge *Higgs*, as Sitton's appellate attorneys are the same attorneys who argued *Higgs*.

unlawful possession of a controlled substance. The State is respectfully requesting this Court not break from the clearly established precedent of not requiring a minimum quantity of a controlled substance and affirm Sitton's convictions.

C. SITTON CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

Sitton argues, for the first time on appeal, that the trial court impermissibly assessed the cost of attorney fees without proper findings of his ability to pay. Brief of Appellant 16-21. The alleged error is not a manifest constitutional error and therefore, Sitton cannot raise this issue for the first time on appeal. Sitton also argues the trial court improperly imposed a 500 dollar Lewis County Drug Fund fee because there is no statutory authority to impose such a fee. Brief of Appellant 21-22. Sitton is incorrect and the 500 dollar Lewis County Drug Fund fee was lawfully imposed.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012). Questions of statutory interpretation are reviewed de novo. *State v. Bao Dinh Dang*, 178 Wn.2d 868, 874, 312 P.3d 30 (2013).

2. Sitton Did Not Object To The Imposition Of Attorney Fees And Cannot Raise The Issue For The First Time On Appeal Because The Alleged Error Is Not A Manifest Constitutional Error.

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). "[F]ailure to object when the trial court imposed court costs under RCW 10.01.160 amounted to a waiver of the statutory (not constitutional) right to have formal findings entered as to [a defendant's] financial circumstances." *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d (1992) (citations omitted). A defendant's failure to object at his sentencing hearing to the court's finding that the defendant has the current or likely future ability to pay legal financial obligations can preclude appellate review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 191-97. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court);

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

The sentencing court did not make an affirmative finding that Sitton had the present or future ability to pay. CP 32-33. There is no boiler plate language with check boxes in the financial section of the judgment and sentence. CP 32-33. Sitton was 31 years old when he was sentenced to two months in jail. CP 27-30. There is nothing in the record that would support Sitton's inability in the future to make payments on his legal financial obligations. The only mention of Sitton's financial affairs was when he stated he paid his mother rent to live in the garage, but not on a monthly basis. RP 140.

Another reason to refuse to review the issue at this time is that the superior courts often keep the financial declaration (reviewed at the time public counsel is appointed) under seal and

not accessible to the prosecutor. This type of documentation could have been considered by the trial court in this case.

The State notes that an appellant making this claim should provide a fair review of the record, i.e. the transcript of the hearing at which public counsel is appointed (at which time the court inquired into a defendant's employment and assets) and the financial declaration form, if any. Sitton's first appearance was April 2, 2013 at which time counsel was appointed. Supp. CP PA.[4] This hearing has not been transcribed.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Sitton is an error of constitutional magnitude, the error is not manifest because there is not a sufficient record for this Court to review the merits of the alleged error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Under RAP 2.5(a) Sitton cannot raise the imposition of legal financial obligations for the first time on appeal and this Court should affirm the sentencing court's imposition of legal financial obligations.

[4] The State will file supplemental Clerk's papers designating the Clerk's minutes from the preliminary appearance hearing.

3. The Trial Court Lawfully Imposed A 500 Dollar Fee For The Lewis County Drug Fund.

Sitton briefly argues there is no statutory authority for the trial court to order him to pay a 500 dollar contribution to a local drug fund. Brief of Appellant 21-22. Sitton ignores *State v. Hunter*'s holding, which is contrary to his position. *State v. Hunter*, 102 Wn. App. 630, 634-35, 9 P.3d 872 (2000), *review denied* 142 Wn.2d 1026 (2001). There is statutory authority to order payment to a county or interlocal drug fund, therefore the trial court's ordered contribution is a lawful exercise of the judge's discretion.

The legislature grants the trial courts the authority and discretion to impose legal financial obligations and require payment of those obligations as a part of a defendant's sentence. RCW 9.94A.760(a). Legal financial obligations are defined as,

> a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.

RCW 9.94A.030(30). In *Hunter* the defendant argued, as Sitton does here, that there was no statutory authority to impose local drug fund contributions. *Hunter*, 102 Wn. App. at 634. The court in

Hunter disagreed, citing to the inclusion of county and interlocal drug funds in the definition of legal financial obligations. *Id.* at 634-35. The statutory authority which grants the trial courts the discretion to impose interlocal or local drug fund contributions can be found in the plain language of the statute. RCW 9.94A.030(30); RCW 9.94A.760(1). Therefore, the trial court did not err in ordering Sitton to contribute 500 dollars to the Lewis County drug fund.

4. The Imposition Of Legal Financial Obligations Is Not Ripe For Review.

Even though the affirmative finding was not made in this case, because the determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). This Court has previously held that the issue is not ripe until the State seeks to collect payment or enforce the judgment. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Therefore, because there is no evidence in the record that the State has sought to

collect or enforce the legal financial obligations portion of Sitton's sentence, the issue is not ripe for review.

IV. CONCLUSION

The deputy prosecutor did not commit misconduct by misstating the law, there was sufficient evidence presented to sustain the conviction, and the trial court's imposition of fees was not improper. This court should affirm Sitton's convictions.

RESPECTFULLY submitted this 15th day of April, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JEFFREY SITTON, Appellant.	No. 45088-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 15, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund, attorney for appellant, at the following email addresses: backlundmistry@gmail.com.

DATED this 15th day of April, 2014, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

April 15, 2014 - 2:22 PM

Transmittal Letter

Document Uploaded: 450887-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 45088-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com